Supreme Court of the United States

October Term, 1954

No. _____

MAX H. BARBER,
Petitioner (Plaintiff-Appellant Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Defendant-Appellee Below).

WILLIAM L. TAYLOR,
Petitioner (Plaintiff-Appellant Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Defendant-Appellee Below).

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND STATEMENT OF REASONS IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioners, Max H. Barber and William L. Taylor, respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth

Circuit to review a judgment of that court entered on September 14, 1954 (Record, 1st typewritten page after Opinion of Court, appended to printed Record), affirming the judgment of the U. S. District Court for the District of Minnesota, Fourth Division, entered July 30, 1953 (Record, p. 47).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The two cases above referred to were tried together in the lower Court and in the Appellate Court. The petitioners seek review of the decision of the Circuit Court affirming the judgment of the District Court to the effect that the plaintiffs, Barber and Taylor, sold the fee title to the real estate involved in the action, as distinguished from the claim of the appellants that what they sold was their optional right to buy the real estate in question. The question at issue is simple, and as above set forth, and it is stated on page 3 of the printed Record of the Opinion, attached to the Transcript, in the fourth paragraph on that page, where the Court said:

> "The question which the District Court was called upon to resolve was whether the sale made * * * was one of their option right merely, or one of the land itself."

If the taxpayers sold merely their option, then they are clearly entitled to recover. If they sold the land itself, then they are not entitled to recover, for the reason that a new six month holding period under the Internal Revenue Law would have commenced to run from the date they acquired the title to the land, until the date of the sale. If they never acquired title to the land, and

never sold the land, but merely sold the option, then it is conceded by everybody that the taxpayers were entitled to recover. See Opinion of lower Court, printed Transcript, p. 29.

JURISDICTIONAL STATEMENT

(a) We do not find that the Opinion of the Circuit Court has been published in any official or unofficial report. The opinion of the District Court is published in 115 F. Supp. 349.

(b) Jurisdiction of this Court is invoked on the following basis:

(i) There were two suits started by the plaintiffs against the United States, each to recover the sum of $7,911.44, Federal Income Taxes alleged to have been erroneously and illegally assessed. The actions were brought under Title 28, U. S. Code, Sec. 1346 (a) (1).

(ii) The date of the judgment sought to be reviewed is September 14, 1954. A petition for rehearing was filed September 30, 1954 (see Petition in printed Transcript), and said petition was denied October 8, 1954 (see Order in printed Transcript). The date of the Judgment in the Court below was July 30, 1953 (Record p. 47), and the Notice of Appeal from the Judgment in the Court below was filed November 23, 1953 (Record p. 57), and a Motion to the Court below to amend Findings, Conclusions of Law and Judgment, or for a new trial, was denied November 10, 1953 (Record p. 54).

(iii) Jurisdiction of the Court is invoked under Sec. 1254, United States Code Annotated (June 25, 1948, Chapter 646, 62 Stat. 928).

(c) The question presented by the appeal is simply this:

(1) Is the holding period of six months provided for in Section 117 of the Internal Revenue Code, 26 U. S. C. A. 117, providing for long term capital gain when a capital asset is held for more than six months, applicable to a situation where the taxpayer acquired an option to buy a piece of real estate, and without conveying the land the taxpayer, did by means of a novation, arrange with the fee owner to convey the land directly to the taxpayer's customer? The circumstances were as set forth in the undisputed facts found in the Opinion of the Circuit Court.

(2) A subsidiary question involved in the foregoing statement of the question is whether or not any of the facts recited by the Court in its opinion, tolled the six month period.

(d) The concise statement of the facts, taken from the Opinion of the Circuit Court, is:

The taxpayers, for a contractual consideration, had obtained an option from Niles Land Co., running from May 14, 1946, to purchase certain mineral lands, in the State of Minnesota, for a cash price of $150,000.00, with the privilege, on exercise of the option, to "designate the nominee to whom conveyance is to be made, if not to the Optionees personally." The taxpayers later, for a contractual consideration, gave Oliver Iron Mining Co. an option, from themselves, running from August 15, 1946, to November 20, 1946, to purchase the lands for a cash price of $200,000.

On November 18, 1946, Oliver Iron Mining Co. gave notice to the taxpayers of its election to exercise its op-

tion. On November 20th, the taxpayers in turn gave notice to Niles Land Co. of their election to exercise their option, with a statement in the notice that they "nominated and designated Oliver Iron Mining Company as the purchaser of said lands in their place and stead."

On November 25th, Niles Land Co. and the taxpayers joined in placing in escrow, with a local bank, a warranty deed running from Niles Land Co. to Oliver Iron Mining Co., for delivery to the latter upon payment by it to the bank, of $150,000 "for account" of Niles Land Co., and of $50,000 "for account" of the taxpayers. Oliver Iron Mining Co. paid the bank the $200,000 on November 29th, in check for $150,000 to the order of Niles Land Co. and check for $50,000 to the order of the taxpayers, and the bank delivered the warranty deed to it. On November 30th Oliver Iron Mining Co. requested and was furnished a quit claim deed from the taxpayers and their wives (1st and 2nd pages of printed Opinion in the Transcript).

(e) We believe that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and an oral argument for their resolution, and the same is supported by the following reasons:

If the decisions of the District Court and of the Appellate Court stand, they will be in conflict with applicable decisions of this Court:

McFeely v. Commissioner of Internal Revenue, 296 U. S. 102, 80 L. Ed., 56 S. Ct. 54, 101 A. L. R. 304.

Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496, 56 S. Ct. 569, 80 L. Ed. 824, reh. den. 297 U. S. 728, 56 S. Ct. 666, 80 L. Ed. 1011.

They will also be in conflict with decisions of other Circuit Courts of Appeal:

Howell v. Commissioner (5th Circuit), 140 F. 2d 765, foll. *Howell's Estate v. Commissioner,* 140 F. 2d 768, cert. den. 322 U. S. 735, 64 S. Ct. 1048, 88 L. Ed. 1569.

Milliken v. Commissioner (2nd Circuit), 196 F. 2d 135, cert. den. 73 S. Ct. 181, 344 U. S. 884, 97 L. Ed. 684, reh. den. 73 S. Ct. 327, 344 U. S. 910, 97 L. Ed. 702.

Sommers v. Commissioner (10th Circuit), 63 F. 2d 551.

Deciding whether or not a holding period under the Code Section above referred to would terminate without a change in the character of the title held by taxpayers, is an important question of Federal Statutory Law, and if it has not already been decided in a manner different from that in the decision in the instant case, it ought to be settled now.

Respectfully submitted,

JOSIAH E. BRILL,
510 Builders Exchange Building,
Minneapolis, Minnesota,
Attorney for the Petitioners.

(Opinion in Causes Nos. 14980 and 14981)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,980

MAX H. BARBER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the District of Minnesota

No. 14,981

WILLIAM L. TAYLOR, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the District of Minnesota

(September 14, 1954)

Josiah E. Brill (Robert C. Morton and John M. Gannon with him on the brief), for Appellants.

Miss Louise Foster, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General; Ellis N. Slack, Special Assistant to the Attorney General; George E. MacKinnon, United States Attorney, and Alex Dim, Assistant United States Attorney, with her on the brief), for Appellee.

Before Sanborn, Johnsen and Collet, Circuit Judges

JOHNSEN, *Circuit Judge:*

Two taxpayers, as partners, made a profit, during the calendar year 1946, on the sale of a capital asset. Each returned his share of the profit, for income-tax purposes, as a long-term capital gain. The Commissioner assessed a de-

ficiency against each, on the ground that the profit had constituted a short-term capital gain only.[1]

Each paid the tax deficiency and thereafter sued, under 28 U. S. C. A. § 1346 (a) (1), for refund. The District Court denied recovery, 115 F. Supp. 349, and each has appealed. The cases were heard together in the trial court, and the appeals have similarly been consolidated here.

The taxpayers, for a contractual consideration, had obtained an option, from Niles Land Co., running from May 14, 1946, to November 30, 1946, to purchase certain mineral lands, in the State of Minnesota, for a cash price of $150,000, with the privilege, on exercise of the option, to "designate the nominee to whom conveyance is to be made, if not to the Optionees personally." The taxpayers later, for a contractual consideration, gave Oliver Iron Mining Co. an option, from themselves, running from August 15, 1946, to November 20, 1946, to purchase the lands for a cash price of $200,000.

On November 18, 1946, Oliver Iron Mining Co. gave notice to the taxpayers of its election to exercise its option. On November 20th, the taxpayers in turn gave notice to Niles Land Co. of their election to exercise their option, with a statement in the notice that they "nominated and designated Oliver Iron Mining Company as the purchaser of said lands in their place and stead."

On November 25th, Niles Land Co. and the taxpayers joined in placing in escrow, with a local bank, a warranty deed running from Niles Land Co. to Oliver Iron Mining Co., for delivery to the latter upon payment by it to the

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[1] Under section 117 of the Internal Revenue Code, 26 U. S. C. A. § 117, "short-term capital gain" is gain derived from the sale or exchange of a capital asset held for six months or less, and "long-term capital gain" is gain derived from the sale or exchange of a capital asset held for more than 6 months. In general, the statute requires the former to be taken into account on a 100% basis, while the latter is permitted to be taken into account on a 50% basis merely, in the computation of capital gains, capital losses and net income, for tax purposes.

bank, of $150,000 "for account" of Niles Land Co., and of $50,000 "for account" of the taxpayers. Oliver Iron Mining Co. paid the bank the $200,000 on November 29th, in check for $150,000 to the order of Niles Land Co. and check for $50,000 to the order of the taxpayers, and the bank delivered the warranty deed to it. On November 30th, Oliver Iron Mining Co. requested and was furnished a quit claim deed from the taxpayers and their wives.

The question which the District Court was called upon to resolve was whether the sale made by the taxpayers to Oliver Iron Mining Co. was one of their option right merely or one of the land itself. If the sale was of the option right merely, then the $50,000 profit represented a long-term capital gain, since the taxpayers had held the option for more than 6 months prior to November 18th, when the purchase obligation of Oliver Iron Mining Co. became created. If the sale was of the land itself, then the taxpayers had a short-term capital gain only, for there was no basis on which any aspect of actual ownership could be said to have existed in them, until the exercise of their option against Niles Land Co. on November 20th.

The District Court held that what the taxpayers had sold to Oliver Iron Mining Co. was legally the land itself—not their option right—and that their $50,000 profit accordingly represented not a long-term, but a short-term, capital gain only. The controlling question here is whether that conclusion can be contended to be clearly erroneous in the situation. We think that it cannot properly be declared so to be.

Among the probative elements relied upon by the trial court in reaching its conclusion were the facts that the option from the taxpayers granted, without any ambiguity, the right to Oliver Iron Mining Co. "to purchase for the sum of Two Hundred Thousand Dollars ($200,000) the following described lands;" that in connection with the right granted to purchase the land the instrument referred to the taxpayers as "Sellers"; that it contained no mention of the existence of the taxpayers' option right, nor did it in any other demonstrable manner purport to relate the obligation, which would become fixed against the taxpayers upon an exercise by Oliver Iron Mining Co. of its option, to the

questions of whether the taxpayers held an option right or how that option right was to be exercised; that the option given by the taxpayers required them to deliver to Oliver Iron Mining Co. "a warranty deed conveying good title," as a matter of absolute obligation on their part, regardless of what right they might or might not have in the land itself, and so necessarily had the effect of constituting the sale to Oliver Iron Mining as one of the property itself and not of the taxpayers' mere option right; that the taxpayers themselves had further given confirmation to the lack of any created legal relationship between their own option right and the right existing in favor of Oliver Iron Mining Co. by their act of making exercise of their option on the basis of their own prerogative right to do so, without having Oliver Iron Mining Co. join in any way as a party thereto, so that the situation stood legally as one of contractual obligation for purchase price and conveyance between the taxpayers and Niles Land Co. only, with the taxpayers thus being left in a position to claim breach and damages for any failure of Niles Land Co. to make conveyance to Oliver Iron Mining Co. as their nominee; and also that the taxpayers had joined with Niles Land Co. in setting up an escrow arrangement, which served the purpose not merely of insuring that they would conveniently get their $50,000 profit, but also of facilitatingly effecting a concurrent discharge of the obligations which they had incurred both to Niles Land Co. and to Oliver Iron Mining Co., and at the same time too, of course, of enabling them to save the expense of revenue stamps for a separate, direct conveyance.

Other probative aspects, supportive of the trial court's conclusion that the taxpayers had sold the land and not their option right, might also cumulatively be mentioned. Thus, in connection with the taxpayers' agreement to furnish Oliver Iron Mining Co. with "a warranty deed conveying to the Optionee good merchantable title to said lands free and clear of all encumbrances," there was no provision requiring the purchaser, unless it voluntarily chose to do so, to accept the warranties of anyone else except the taxpayers themselves. Nor was there any pro-

vision relieving the taxpayers of liability for failure to furnish Oliver Iron Mining Co. with proper title, from any inability on their part to obtain such a title from Niles Land Co. on the basis of their option, or for any other lack of fault on their part in making good their obligation. To the contrary, the taxpayers explicitly bound themselves to deliver a conveyance of good title and to cure any possible defect that might marketably exist in that title, no matter what they might have to do to accomplish this result.

Again, the consideration, as expressed in the contract, was an entirety for the conveyance of title. Oliver Iron Mining Co. agreed to pay for a delivery of the complete title only, and not apportionable or separately for the assimilating in it of such various constituent elements or constitutive interests as might happen to be outstanding. It was without any right to say how or among whom the purchase price should be distributed or apportioned. And, further, on the question of whether there existed any legal relationship between the two options, it also, cumulatively at least, could properly be noticed that the taxpayers had not granted Oliver Iron Mining Co. an option right coextensive with their own, for theirs ran to November 30th, while the one they gave to Oliver Iron Mining Co. extended only to November 20th. Thus, this fact too would be capable of contextual indication that the taxpayers desired and intended to retain at all times a direct personal hold upon their option right, as a basis for being able to establish a privity and an obligation on the part of Niles Land Co. to them personally in the fulfillment of the provisions of their option.

All of these things together plainly give the trial court's conclusion, that the taxpayers were sellers of the land and not of their option, a sound legal reality, as a matter of both adequate form and substance, in the situation. Indeed, it is a bit difficult to see how the court would have been able to reach any other conclusion than it did.

The taxpayers' argument, that they necessarily must have sold their option right, because they never had the land to sell, is legally specious, for, as previously pointed out, their contract obligated them to provide Oliver Iron

Mining Co. with title, no matter how Oliver Iron Mining Co. might subsequently be willing to allow the conveyance of that title to be effected, so that whether they ever actually held legal title or not to the property could not be said to be decisive of what it was that they had agreed to sell. And the fact that, after the exercising by them of their option right, without having the deed made to themselves as they could have insisted be done, the taxpayers gave, at the purchaser's request, a quit claim deed from themselves and their wives, would at least lend no support to the taxpayers' contention that the transaction was in legal nature and result simply an assignment of their option right.

Equally artificial is the taxpayers' argument that what they exercised was not their option to purchase the land but simply "their option to require Niles to sell to Oliver." The only option granted them by their contract was "the right * * * to purchase * * * the following described lands," with a provision that, "If the Optionees elect to purchase said premises, they shall give notice thereof in writing * * * and * * * shall * * * designate the nominee to whom conveyance is to be made, if not to the Optionees personally." The notice given by the taxpayers to Niles Land Co. stated that they "do hereby elect to exercise the option * * * granted by you to them to purchase * * * the following described lands," and then added, in a separate paragraph, that they "have nominated and designated Oliver Iron Mining Company as the purchaser of said lands in their place and stead," with a "request" that Niles Land Co. execute a warranty deed in favor of Oliver Iron Mining Co. and deliver it to a named local bank, and with a promise or assurance on the part of the taxpayers that the "purchase price * * * will be paid upon delivery as aforesaid of such Warranty Deed * * *."

The taxpayers do not, of course, argue that they meant this notice to transfer to Niles Land Co. the obligation of Oliver Mining Co., created by the exercise of its option, for payment of the $200,000 purchase price. Nor had any privity between Oliver Iron Mining Co. and Niles Land Co. been in any other way created, that could be said to have

legally given rise to a liability for $150,000 to Niles Land Co. on the part of Oliver Iron Mining Co., should the latter for any reason thereafter have refused to go through with its deal with the taxpayers.[2] Thus, when the taxpayers exercised their option, they, and only they, were the ones who could be said to have become legally subject to an obligation to Niles Land Co. for payment of the $150,000 purchase price.

Niles Land Co. had not given the taxpayers the right to designate a nominee to receive conveyance of the title and thereby be released from obligation or liability for the agreed purchase price. The right to "designate the nominee to whom conveyance is to be made, if not to the Optionees personally," was, as has been indicated, not a separate or independently exercisable right, but one which was a part or an incident merely of the exercising by the taxpayers of their right to purchase and of the creation of an obligation for the purchase price in consequence of the exercise of that right. The taxpayers did not, as they contend, have an "option to require Niles to sell to Oliver," within the legal implications of the term "sell".

It also has been argued in effect that the situation here was, in all its practical aspects and results, equivalent to an assignment by the taxpayers of their option right and that it should therefore realistically be so regarded. But the fruits of business transactions are not required to be viewed for tax purposes on the basis of practical aspects or results alone, if they involve the creation or the use of legal realities, in both form and substance, on which a different and greater tax liability can exist. The taxing authorities have the general right to assess income taxes on the basis of the sound legal and equitable realities which have existed in the taxpayer's situation. They may also at times, of course, pierce the mere form of apparent legal

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[2] Legal privity would of course have existed between Oliver Iron Mining Co. and Niles Land Co., if the taxpayers had in fact assigned their option right to Oliver Iron Mining Co. and the latter had authorized the taxpayers to exercise the option in its behalf.

reality and examine the practical or economic actualities of what the taxpayer has done, where these outweigh the substance of the legal reality. But the choice of the tax course to be applied in any such situation, where there may be a right to a choice, is the Government's, not the taxpayer's.

These principles have had their most frequent application and emphasis in the use by a taxpayer of corporate form and means. See e. g. *Higgins* v. *Smith*, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981; *Palcar Real Estate Co.* v. *Commissioner*, 8 Cir., 131 F. 2d 210; *Porter Royalty Co.* v. *Commissioner*, 6 Cir., 165 F. 2d 933; *Railway Express Agency* v. *Commissioner*, 2 Cir., 169 F. 2d 195; *Kaufmann* v. *Commissioner*, 3 Cir., 175 F. 2d 28. But other legal realities, from sufficient form and substance, such as those involved here, which a taxpayer has employed in the production of income, are equally as unescapable by him in the nature of the tax result to which they may give rise.

The judgment of the District Court in each of the two cases is affirmed.

(Judgment in Cause No. 14980)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1954

Tuesday, September 14, 1954

No. 14980

MAX H. BARBER, *Appellant*,

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the District of Minnesota

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and

adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

September 14, 1954.

(Judgment in Cause No. 14981)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1954

Tuesday, September 14, 1954

No. 14981

WILLIAM L. TAYLOR, *Appellant,*

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the District of Minnesota

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

September 14, 1954.

(Order Denying Petition of Appellants for Rehearing in Causes Nos. 14980 and 14981)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1954

Friday, October 8, 1954

No. 14980

MAX H. BARBER, *Appellant,*

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the District of Minnesota

No. 14981

WILLIAM L. TAYLOR, *Appellant,*

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the District of Minnesota

Petition for rehearing filed by appellants in these causes having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

October 8, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 419

MAX H. BARBER, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM L. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 37-43) is reported at 115 F. Supp. 349. The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1954 (Pet. 2), and the petition for rehearing was denied on October 8, 1954

(Pet. 3). The petition for a writ of certiorari was filed October 25, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether petitioners sold certain land, rather than an option to buy land, and were therefore required to report the profit from such sale as short-term capital gains.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) *Definitions.*—As used in this chapter—
>
> * * * * *
>
> (2) [as amended by Sec. 150 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing net income;
>
> * * * * *
>
> (4) [as amended by Sec. 150 (a) of the Revenue Act of 1942, *supra*] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6

months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(b) [as amended by Sec. 150 (c) of the Revenue Act of 1942, *supra*] *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * * *

(26 U. S. C. 117.)

STATEMENT

The facts as found by the District Court (R. 43-46) may be summarized as follows:

The petitioners in these cases were equal partners. On May 3, 1946, they obtained an option from the Niles Land Company to buy certain mineral land for $150,000. This option was later extended to November 30, 1946. (R. 44-45.)

On September 9, 1946, the petitioners gave the Oliver Iron Mining Company an option to buy the same land for $200,000 and such option was ex-

tended to run to November 20, 1946. On November 18, 1946, the latter company notified the petitioners of its election to exercise its option for the price indicated therein. (R. 45.)

Thereafter, on November 20, 1946, the petitioners notified the Niles Land Company of their election to exercise their option to buy the mineral land referred to above for $150,000. In their notice, and as the option agreement permitted, the petitioners nominated the Oliver Iron Mining Company as the purchaser of the land in their place. Instructions were given to an escrow agent, First and American National Bank of Duluth, in a letter signed by the petitioners and the Niles Land Company, for consummation of the transaction. At the same time a warranty deed for the land, running from the Niles Land Company to Oliver Iron Mining Company, was delivered to the escrow agent. (R. 45.)

On November 29, 1946, the escrow agent stated in a letter to the petitioners that they had delivered the warranty deed on that day to Oliver Iron Mining Company and had received two checks totalling $200,000. One check in the amount of $150,000 was made payable to the Niles Land Company and the other in the amount of $50,000 was payable to the petitioners in accordance with instructions given to the escrow agent. (R. 45.)

At the requirement of Oliver Iron Mining Company the petitioners and their wives gave to that company a quit claim deed to the mineral land involved herein on November 30, 1946. (R. 45.)

The District Court found that upon the exercise of their option to purchase the mineral lands on November 20, 1946, the petitioners acquired the mineral land herein involved; that the sale of such mineral land to Oliver Iron Mining Company occurred on November 29, 1946, which was less than six months from the date of the acquisition of the land by the petitioners; and that as a result of the above transaction the petitioners realized a short-term capital gain of $49,195 under Section 117 (a) (2) of the Internal Revenue Code which was entirely taxable under the provisions of that section. (R. 45-46.)

Judgment was accordingly entered for the United States in each case on July 30, 1953 (R. 47, 54).

The Court of Appeals affirmed. (Pet. 2, 3.)

ARGUMENT

The court below, in affirming the trial court, correctly held that the petitioners sold land rather than their option to buy land and that the profit from the sale was a short-term capital gain within Section 117 of the Internal Revenue Code of 1939, *supra,* p. 2. This decision is amply supported by the record.

The Niles Land Company granted petitioners an option "to purchase" the land involved here for $150,000 (R. 20-24) and that option was never assigned or sold but was retained until petitioners exercised it on November 20 (R. 29). In the mean-

time petitioners granted the Oliver Iron Mining Company an option "to purchase" the same land for $200,000. This second option did not mention the first one but referred to petitioners as "Sellers" of the land and required them, if the optionee elected to purchase the land, to deliver "a warranty deed conveying to the Optionee good merchantable title to said lands free and clear of all encumbrances". (Ex. C, R. 25-26.) Oliver exercised its option in a document addressed to petitioners and stating that it elected "to purchase" the land, and would pay the "purchase price" of $200,000 upon delivery of a warranty deed. (Ex. D, R. 28.) Then, as indicated, petitioners exercised their option by advising Niles that they thereby elected to exercise the option granted them to purchase the land for $150,000 and that they were nominating Oliver as the purchaser in their stead. (Ex. E, R. 29.)

Thus, as the court below stated, the situation then stood legally as one of contractual obligation for the purchase price and conveyance between the petitioners and Niles only, with the former being left in a position to claim breach and damages for any failure by Niles to convey to Oliver as their nominee. Thereafter, on November 25th, petitioners joined Niles in an escrow agreement and in this way not only provided for payment of their $50,000 profit but also effected a concurrent discharge of their obligations to Niles and to Oliver. (Exs. F and G, R. 30-31.) After delivery to Oliver

of the warranty deed executed by Niles, petitioners and their wives also gave Oliver a quit claim deed at the latter's request. (Ex. K, R. 35-36.) We submit that all of this documentary proof plainly shows that there is a sound legal basis for holding that petitioners sold land rather than their option.

The decision here is not in conflict with the cases petitioners rely on. In *McFeely* v. *Commissioner,* 296 U. S. 102, it was decided that taxpayers who acquired property from decedents held it, under the capital gains provisions, from the date of death and that it was immaterial that before actual distribution to some of the taxpayers the property had first passed to personal representatives of the deceased for administration purposes. Thus, although the facts there were different, that case supports the Government's contention since actual possession by the vendors there was not considered necessary in order to start the holding period under capital gain provisions.

Helvering v. *San Joaquin Co.,* 297 U. S. 496, rehearing denied, 297 U. S. 728, also involved different facts. There the property which was sold was obtained upon exercise of an option granted simultaneously with a lease on the same property. The taxpayer contended that its holding period started with the granting of the option and the lease. But this Court held that the property was not acquired until the option was exercised. The decision in the *San Joaquin* case was followed in *Milliken* v. *Commissioner,* 196 F. 2d 135 (C. A. 2d), certiorari de-

nied, 344 U. S. 884, rehearing denied, 344 U. S. 910, which decided that where an option is held more than six months prior to the sale of property but the date of exercising the option is less than six months the latter date determines the holding period. The rulings in these two cases do not conflict with the Government's position here.

No option was involved either in *Howell* v. *Commissioner,* 140 F. 2d 765 (C. A. 5th), or in *Sommers* v. *Commissioner,* 63 F. 2d 551 (C. A. 10th). In the *Howell* case the question was when taxpayer became the owner of the oil lease which was sold. Under the agreement there taxpayer was to get a lease if he started drilling by a named date, and he complied with that requirement. The court there held that for capital gain purposes taxpayer could not treat the period prior to the drilling as part of his holding period since he had not then acquired the lease. In the *Sommers* case the sale involved the last of several blocks of stock issued to taxpayer on different dates. Taxpayer contended that such stock was acquired when he first subscribed for all of the stock, but as the issuing corporation was not bound by taxpayer's promise to purchase stock the court held that taxpayer did not become the owner of the last block until it was actually issued and that his holding period could not commence until then. But here petitioners got an unconditional right to the land when they exercised their option. Therefore the situation is clearly distinguishable.

CONCLUSION

The decision of the court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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